

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMY KONDA,

Plaintiff,

v.

UNITED AIRLINES, INC.,

Defendant.

CASE NO. 2:21-cv-01320-LK

ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO COMPEL

This matter comes before the Court on Defendant United Airlines, Inc.’s motion to compel. Dkt. No. 36. In this disability discrimination case, United seeks an order compelling Plaintiff Amy Konda to produce medical records in her possession and “sign a medical release and authorization” so United can “obtain [her] outstanding medical records responsive to Defendant’s First Requests for Production.” *Id.* at 2. For the reasons set forth below, the Court grants the motion in part and denies it in part.¹

¹ Because the motion can be resolved based on the parties’ filings, the Court denies United’s request for oral argument.

I. BACKGROUND

Since 2002, Konda has worked for United at SeaTac Airport as a Station Operations Representative (“SOR”). Dkt. No. 1-1 at 4. Konda has diabetes and alleges that decades ago, United wrongfully instituted a “diabetic policy” that precluded employees with diabetes and other medical conditions from operating jet bridges. *Id.* at 3–4. In 2018, United announced that SORs would be required to operate jet bridges. *Id.* at 4. According to Konda’s complaint, United initially did not respond to her repeated questions about what she should do with respect to the required jet bridge training in light of United’s diabetic policy. *Id.* at 4–5. After the deadline for completing such training passed, United required Konda to undergo a medical evaluation and told her the only possible accommodation was for her to transfer to another position. *Id.* at 5–6. Konda did not accept that accommodation, and United placed her on unpaid leave for approximately 10 weeks from July 2018 to September 2018. *Id.* at 6–8. She was allowed to resume working after she and United agreed that she would carry a medical kit, called a “Go Pack,” with her while she operated jet bridges. *Id.* at 8; Dkt. No. 40 at 2.

Konda filed suit in King County Superior Court on July 2, 2021 and served United with the summons and complaint on September 8, 2021. Dkt. No. 1 at 1–2. Konda asserts claims under the Washington Law Against Discrimination (“WLAD”), Wash. Rev. Code § 49.60 *et seq.*, for disability discrimination, failure to reasonably accommodate her disability, and retaliation, Dkt. No. 1-1 at 9–11. On September 28, 2021, United removed the case to this Court based on diversity and federal question jurisdiction. Dkt. No. 1 at 2–8. With respect to the latter, United contends that the Railway Labor Act, 45 U.S.C §§ 151, *et seq.*, 181, *et seq.*, preempts Konda’s claims and provides federal question jurisdiction. Dkt. No. 1 at 5–8.

This discovery dispute, which has dragged on for nearly a year, ensued. On April 6, 2022, United served its First Set of Interrogatories and Requests for Production to Plaintiff. Dkt. No. 37

1 at 1. Konda provided responses and supplemental responses in June 2022. Dkt. No. 37 at 2. Despite
 2 the supplement, United still considered her responses to be deficient, and after attempting to
 3 resolve the dispute with Konda for two months, filed a motion to compel in November 2022. *Id.*
 4 at 2–3; Dkt. No. 27. Soon after, Konda “corrected all discovery deficiencies except for the
 5 production of documents responsive to [Requests for Production] 9, 18–19 (related to Plaintiff’s
 6 health condition and medical records).” Dkt. No. 37 at 3. United withdrew its motion to compel.
 7 Dkt. No. 30 at 1.

8 The parties continued to confer, and Konda eventually produced medical records from
 9 August 13, 2018 through February 8, 2022. Dkt. No. 37 at 3. However, United continues to seek
 10 all medical records responsive to its Requests for Production 9, 18, and 19:

11 **REQUEST FOR PRODUCTION NO. 9:** Please produce all communications
 12 between Plaintiff and any person regarding Plaintiff’s health (including mental and
 13 physical health) while Plaintiff has been employed by Defendant regarding the
 14 allegations in the Complaint.

15 **REQUEST FOR PRODUCTION NO. 18:** Produce all documents, including
 16 without limitation bills, statements, correspondence, progress notes, and
 17 prescriptions, that refer or relate to [every physical, emotional or mental ailment,
 18 complaint, condition, injury, or illness, which you claim to have suffered as a result
 19 of the wrongful conduct alleged in the Complaint].

20 **REQUEST FOR PRODUCTION NO. 19:** Produce all documents that refer or
 21 relate to [every clinic, hospital, physician, psychiatrist, psychologist, therapist,
 22 counselor or other health care provider that has consulted with and/or treated you
 23 for any reason since January 1, 2017].

24 Dkt. No. 37 at 3, 12, 16 (bracketed text in corresponding interrogatories).

25 II. DISCUSSION

26 United argues that it is entitled to the medical records Konda has withheld because she has
 27 waived any privilege associated with those records. Dkt. No. 36 at 6–7; Dkt. No. 47 at 2–4. It
 28 asserts that without those records, discovery “has essentially come to a halt[.]” Dkt. No. 36 at 5.
 29 Konda counters that her medical records are privileged and irrelevant, and that their disclosure

1 would unnecessarily invade her privacy. Dkt. No. 39 at 6, 8, 11.

2 **A. The Meet and Confer Requirement**

3 A motion to compel “must include a certification that the movant has in good faith
4 conferred or attempted to confer with the person or party failing to make disclosure or discovery
5 in an effort to obtain it without court action.” Fed. R. Civ. P. 37(a)(1); *see also* LCR 37(a)(1).
6 Here, the parties met and conferred on January 30, 2023, but were unable to resolve the matter.
7 Dkt. No. 36 at 9; Dkt. No. 37 at 4.

8 **B. Applicable Law Regarding Privilege**

9 Each party is entitled to discovery of “any nonprivileged matter that is relevant to any
10 party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). In
11 evaluating a disputed discovery request, the Court should consider “the importance of the issues
12 at stake in the action, the amount in controversy, the parties’ relative access to relevant information,
13 the parties’ resources, the importance of the discovery in resolving the issues, and whether the
14 burden or expense of the proposed discovery outweighs its likely benefit.” *Id.* Materials need not
15 be admissible in evidence to be discoverable. *Id.* District courts ultimately retain broad discretion
16 to permit or deny discovery, *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002), and this broad
17 discretion encompasses relevancy determinations, *Survivor Media, Inc. v. Survivor Prods.*, 406
18 F.3d 625, 635 (9th Cir. 2005).

19 United argues that federal law governs the privileges at issue. Dkt. No. 36 at 6, 8; Dkt. No.
20 47 at 2–4; *see, e.g., Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n.10 (9th Cir. 1992)
21 (per curiam) (noting that federal common law applies to privilege issues in federal question cases).
22 Although it is true that the federal law of privilege applies to a case that involves both state and
23 federal claims, *Wilcox v. Arpaio*, 753 F.3d 872, 876 (9th Cir. 2014), state law governs privilege
24 where a federal court is sitting in diversity. *Microsoft Corp. v. Immersion Corp.*, No. C07-

936RSM, 2008 WL 11343462, at *2 (W.D. Wash. Mar. 24, 2008); Fed. R. Evid. 501 (“[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”).² Although United alleges federal question jurisdiction based on complete preemption under the Railway Labor Act, Dkt. No. 1 at 5–8, at this point it is unclear at best that such jurisdiction exists. *See, e.g., Miglio v. United Airlines*, No. C13-573RAJ, 2014 WL 1089285, at *5 (W.D. Wash. Mar. 17, 2014) (declining to dismiss WLAD claim on the basis of Railway Labor Act preemption because “United has pointed to no dispute over the interpretation of the CBA that will *necessarily* arise in the course of this litigation” and “it is entirely possible for [plaintiff] to litigate this suit in a way that does not require interpretation of the CBA”); *see also Humble v. Boeing Co.*, 305 F.3d 1004, 1009 (9th Cir. 2002) (declining to find complete preemption under an analogous statute where the WLAD provided “independent, and more extensive reasonable accommodation duties”). In its notice of removal, United asserted in the alternative that the Court has diversity jurisdiction. Dkt. No. 1 at 2–5. The Court agrees that there is an adequate basis to exercise jurisdiction over this dispute under 28 U.S.C. § 1332. *See id.* Therefore, the Court, sitting in diversity, applies state privilege law.

C. United Is Entitled to Certain of Konda’s Medical Records Because She has Waived the Physician-Patient Privilege

The physician-patient and psychologist-patient privileges are protected by statute in Washington. Wash. Rev. Code § 5.60.060(4) (physicians); *Id.* § 18.83.110 (psychologists). As Konda concedes, plaintiffs waive the physician-patient privilege by filing a claim for damages alleging disability discrimination. Dkt. No. 39 at 9; *see* Wash. Rev. Code § 5.60.060(4)(b) (“Ninety

² The Notes to Rule 501 explain that “in diversity cases where the litigation in question turns on a substantive question of State law, . . . the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise.)” Fed. R. Evid. 501, Notes of Committee on the Judiciary, Senate Report No. 93-1277.

1 days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to
2 waive the physician-patient privilege.”); *Sherman v. State*, 905 P.2d 355, 377 (Wash. 1995) (“By
3 filing an action for damages in which he included claims of handicap discrimination and
4 defamation, Dr. Sherman has waived the physician/patient privilege.”). The WLAD also provides
5 that a plaintiff waives health care privileges in seeking noneconomic damages if she alleges “a
6 specific diagnosed physical or psychiatric injury as a proximate result of the respondents’ conduct,
7 and relies on the records or testimony of a health care provider or expert witness to seek general
8 damages,” or alleges “failure to accommodate a disability or . . . discrimination on the basis of
9 disability.” Wash. Rev. Code § 49.60.510(1)(a)–(b).

10 Konda argues that even if her lawsuit “technically” waives the physician-patient privilege,
11 records about her diabetes are not relevant because there is no dispute that she has diabetes or that
12 the Go Pack is an effective accommodation. Dkt. No. 39 at 6, 8–9. But United’s requests are not
13 limited to records regarding her diabetes. *See* Dkt. No. 37 at 3, 12, 16. And Konda has made her
14 diabetes—and other medical issues—relevant by alleging that United failed to accommodate her
15 and discriminated against her because of her diabetes and thereby caused her to suffer other
16 maladies. Dkt. No. 1-1 at 9–10, 12; *see also, e.g., Rollins v. Traylor Bros., Inc.*, C14-1414-JCC,
17 2017 WL 1756576, at *6 (W.D. Wash. May 5, 2017) (denying protective order regarding medical
18 records and allowing Defendants to obtain “all medical records relating to” plaintiff’s medical
19 condition because plaintiff claimed adverse action based on that condition). Because records
20 regarding Konda’s diabetes are relevant and she has waived her physician-patient privilege by
21 alleging disability discrimination and failure to accommodate, the Court will compel her to
22 produce records regarding her diabetes.

23 With respect to the other maladies Konda blames on United—anxiety, weight loss, loss of
24 appetite, and gastrointestinal issues—it appears that she is only seeking noneconomic damages.

1 *See, e.g.*, Dkt. No. 37 at 28–29, 54. Therefore, she has waived any associated health care privilege
 2 under the WLAD to the extent those conditions constitute specific diagnosed injuries and she
 3 intends to rely on related records or testimony of a health care provider or expert witness to seek
 4 general damages. *See* Wash. Rev. Code § 49.60.510(1)(a)–(b). If so, Konda must produce records
 5 responsive to such conditions for the time period set forth in the next section.

6 In sum, Konda must produce all responsive medical records regarding her diabetes, and
 7 with respect to other maladies for which she seeks noneconomic damages and will rely on the
 8 records or testimony of a health care provider or expert witness to seek general damages,
 9 responsive medical records from the time period below pertaining to those maladies that constitute
 10 a specific diagnosed physical or psychiatric injury. The Court finds that Konda’s concerns about
 11 her privacy are mitigated by the protective order. Dkt. No. 22 at 2 (including “Plaintiff’s medical
 12 records” in the definition of “Confidential” material).

13 **D. United Is Entitled to Certain of Konda’s Mental Health Records to the Extent She**
 14 **Has Waived the Psychologist-Patient Privilege Under the WLAD**

15 United argues that Konda’s filing of her personal injury action also waived the
 16 psychologist-patient privilege under Wash. Rev. Code § 5.60.060(4)(b). Dkt. No. 47 at 3. But a
 17 waiver of the psychologist-patient privilege is not “automatic” like the waiver of the physician-
 18 patient privilege in personal injury actions. *Magney v. Truc Pham*, 466 P.3d 1077, 1087 (Wash.
 19 2020). And the case on which United relies to support such a waiver in turn relied on a case that
 20 was subsequently abrogated in relevant part by the recent amendment to the WLAD that limits
 21 access to health care records (discussed above). Dkt. No. 47 at 3 (citing *Carrig v. Kellogg USA*
 22 *Inc.*, No. C12-837-RSM, 2013 WL 392715, at *2 (W.D. Wash. Jan. 30, 2013) (relying on *Lodis*
 23 *v. Corbis Holdings, Inc.*, 292 P.3d 779, 791 (Wash. Ct. App. 2013))); *see Magney*, 466 P.3d at
 24 1086–87 (questioning the continued validity of *Lodis*); *see also id.* at 1092 (Gordon McCloud, J.,

1 concurring in part) (“[T]he legislature has now passed a law that effectively overrules *Lodis*”
 2 (citing Wash. Rev. Code § 49.60.510)).

3 Again, seeking noneconomic damages under the WLAD does not waive any health care
 4 privilege unless the plaintiff (1) alleges that the defendant proximately caused “a specific
 5 diagnosed physical or psychiatric injury” and “relies on the records or testimony of a health care
 6 provider or expert witness to seek general damages” for such injury, or (2) alleges “failure to
 7 accommodate a disability or . . . discrimination on the basis of disability.” Wash. Rev. Code
 8 § 49.60.510(1)(a)–(b). Konda has alleged both a failure to accommodate and discrimination based
 9 on her disability. Dkt. No. 1-1 at 9–11. She has also asserted that United caused her to suffer
 10 anxiety, weight loss, loss of appetite, and gastrointestinal issues. Dkt. No. 37 at 29, 54.
 11 Accordingly, to the extent those conditions constitute specific diagnosed injuries and Konda
 12 intends to rely on the records or testimony of a health care provider or expert witness to seek
 13 general damages with respect to those conditions, she has waived any associated health care
 14 privilege, including the psychologist-patient privilege. *See* Wash. Rev. Code § 49.60.510(1)(a)–
 15 (b).

16 With respect to the scope of the waiver, the statute provides that:

17 [a]ny waiver under subsection (1)(a) and (b) of this section is limited to health care
 18 records and communication between a claimant and his or her provider or
 providers:

19 (a) Created or occurring in the period beginning two years immediately
 20 preceding the first alleged unlawful act for which the claimant seeks
 21 damages and ending at the last date for which the claimant seeks damages,
 unless the court finds exceptional circumstances to order a longer period of
 time; and

22 (b) Relating specifically to the diagnosed injury, to the health care provider
 23 or providers on which the claimant relies in the action, or to the disability
 specifically at issue in the allegation.

24 *Id.* § 49.60.510(2)(a)–(b). Those categories apply to records regarding physical and mental

1 conditions because the statute encompasses both. *Id.* § 49.60.510(1)(a), (2)(b).³ The relevant time
2 period of the waiver is “the period beginning two years immediately preceding the first alleged
3 unlawful act for which the claimant seeks damages and ending at the last date for which the
4 claimant seeks damages,” absent exceptional circumstances justifying a longer period of time. *Id.*
5 § 49.60.510(2)(a). Neither party addresses when that time period began. However, the first
6 unlawful action alleged by Konda appears to be United’s February 23, 2018 failure to respond to
7 her question about jet bridge training. Dkt. No. 1-1 at 4. United identifies no exceptional
8 circumstances justifying an extension of the two-year statutory waiver period. Therefore, to the
9 extent the maladies for which Konda seeks noneconomic damages constitute a specific diagnosed
10 physical or psychiatric injury and Konda will rely on the records or testimony of a health care
11 provider or expert witness to seek general damages, Konda must produce responsive records dating
12 back to February 23, 2016.

13 **E. Konda Is Required to Sign a Medical Release**

14 United argues that the Court should require Konda to sign an authorization releasing her
15 medical records. Dkt. No. 36 at 8–9. The “collegial practice of signing stipulations for records
16 releases is fairly routine in this district.” *Robertson*, 2020 WL 1819842, at *7 n.7 (cleaned up). But
17 if a party refuses, the Court can require parties to sign medical releases to obtain records. *See*
18 *Putterman v. Supreme Chain Logistics, Ltd.*, No. C18-376-RSM, 2018 WL 6179325, at *3 (W.D.
19 Wash. Nov. 27, 2018) (collecting cases); *Lee v. Asplundh Tree Expert Co.*, No. C17-719-MJP,
20 2017 WL 6731978, at *1 (W.D. Wash. Dec. 29, 2017) (compelling plaintiff to provide defendant
21 with signed stipulations of release for her medical records). Konda does not dispute, or even
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23 ³ Because federal privilege law does not apply and the Court can apply the WLAD’s statutory language, it does not
24 wade into the murky waters of determining whether Konda is alleging “garden variety” emotional distress or
something more. *See, e.g., Carrig*, 2013 WL 392715, at *2 (explaining the federal common law approach to waiver
for the psychotherapist-patient privilege).

1 address, the issue of releases. Therefore, the Court orders her to sign medical releases to allow
2 United to obtain the medical records identified above.

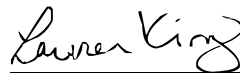
3 **III. CONCLUSION**

4 The Court GRANTS IN PART AND DENIES IN PART United's motion, Dkt. No. 36,
5 and compels Konda to produce medical records responsive to United's Requests for Production 9,
6 18, and 19 as follows:

- 7 • With respect to her diabetes, all responsive medical records;
- 8 • With respect to other maladies for which Konda seeks noneconomic damages and
9 will rely on the records or testimony of a health care provider or expert witness to
10 seek general damages, responsive medical records dating back to February 23, 2016
11 pertaining to those maladies that constitute a specific diagnosed physical or
12 psychiatric injury.

13 The Court denies the motion as to any other health care records.

14 Dated this 10th day of April, 2023.

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Lauren King
17 United States District Judge
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